the "competitive checklist."[12] DOJ stated in its May 16th evaluation of SBC's Oklahoma application that checklist compliance can be met through multiple approved agreements provided there is a mechanism, such as a "most favored nations" clause, which "readily allows provisions of other approved interconnection agreements to be imported into agreements with qualifying Track A competitors" (DOJ Evaluation at 22).

ALTS agrees with the Department that there should be no need to require checklist compliance through a single new entrant so long as there is a robust mechanism that provides current or future entrants access to each item on the same terms.[13] The Commission's Section 252(i) regulations guarantee that any carrier can order any particular items from state approved interconnection agreements, including checklist items, on the same terms and conditions.

Absent Ameritech's agreement to be bound by the Commission's Section 252(i) regulations, Ameritech could devise unique interconnection agreements that lack any practical usefulness,

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[12] Ameritech asserts in its Brief that it: "is complying with the Commission's regulations as adopted and will comply with any revised regulations adopted to comply with any action taken by the court of appeals" (at n. 5). However, Ameritech makes no mention in its application of complying with the Commission's Section 252(i) regulations (47 C.F.R. § 51.809), and speaks only of its "MFN" provisions, which operate quite differently than these rules (Brief at 16-17).

[13] See ALTS's position paper "Section 271: Creating Sustainable Local Competition Before the RBOCs Enter Long Distance" at 14-16.

because of their packaging, to any competitor except the signatory. Ameritech could then use such agreements to show checklist compliance under a "mix-and-match" approach, even though other competitors would lack effective access to the particular checklist items involved.

Most MFN clauses would not provide the same protections as the Commission's Section 252(i) rules. An MFN clause typically only permits the signatories to request terms from other agreements. Such a provision might not be adequate to fully protect other interconnectors. For example, such clauses might permit exceptions based on term and volume conditions even if such conditions did not reflect differences in underlying costs. Compare 47 C.F.R. § 51.809(b)(1). Furthermore, even if Ameritech were to include satisfactory MFN clauses in its existing agreements, there would be no assurance that it would include the same provisions in the agreements of future new entrants. In the absence of Ameritech's voluntary compliance with Rule 51.809, or the eventual judicial vindication of the Commission's Section 252(i) rules, "mix-and-match" compliance with Section 271 under simple MFN clauses creates an intolerable opportunity for market cartelization.

D. Track A Agreements Must Contain Final Prices That Comply with the 1996 Act.

Ameritech contends that: " ... the rates and discounts contained in the AT&T and Sprint Agreements are available to Brooks Fiber, MFS and TCG through the MFN clauses in their agreements, and these rates and discounts comply with the Section 252(d) pricing standards" (Brief at 34). Only in a footnote does Ameritech allude to the fact that permanent rates will only be established in the MPSC's Case No. U-11280 (id. at n. 36). See the MPSC Comments filed February 5, 1997, in CC Docket No. 97-1 at 9: "The interconnection requirements of Section 251 of the Act, the pricing requirements of Section 252 of the Act, and the FCC Rules interpreting those sections were not applied to these negotiated agreements." (Emphasis supplied.)

The absence of prices that have received final approval pursuant to the cost provisions of the 1996 Act clearly precludes the granting of any Section 271 application. As the Georgia PSC explained in rejecting BellSouth's attempted Section 271 reliance on an SGAT that used interim prices (Media Advisory issued March 20, 1997): "The statement was rejected as much of the Federal Act's criteria requires that rates charged to competitors be based on cost. Many of the rates decided by the PSC thus far have been interim rates that will be adjusted once the PSC sets cost-based permanent rates."

The absence of final prices is not trivial. Neither the Commission nor potential competitors currently have any concrete assurance -- given the Eighth Circuit's stay of the Commission's pricing rules -- that the costing principles ultimately employed by a state agency will actually foster economically efficient local competition in any meaningful fashion.[14] While the states may eventually gain the legal power to impose interconnection prices that fall short of what the Commission would require, that power should not, and would not enable the Commission to disregard the absence of pricing compliance which it has acknowledged to be a necessary predicate to the grant of a Section 271 application.

It is manifest the Commission adopted its pricing principles with the goal of encouraging rapid implementation of effective local competition. Local Competition Order (¶ 114):

> "We believe that national rules should reduce the parties' uncertainty about the outcome that may be reached by different states in their respective regulatory proceedings, which will reduce regulatory burdens for all parties including small incumbent LECs and small entities. Failure to adopt national pricing rules, on the other hand, could lead to widely disparate state policies that could delay the consummation of interconnection arrangements and otherwise hinder the development of local competition. Lack of national rules could also provide opportunities for incumbent LECs to inhibit or delay the interconnection efforts of new competitors, and create great uncertainty for the industry, capital markets, regulators, and courts as to

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[14] In the Matter, on the Commission's own motion, to consider the total service long run incremental costs and to determine the prices of unbundled network elements, interconnection services, resold services, and basic local exchange services for Ameritech Michigan, Case Nos. U-11280, U-11281, and U-11224, at 3: "The Commission finds that it is appropriate to conduct a comprehensive review for each company to consider their TSLRIC studies and to determine the prices of unbundled network elements, interconnection services, resold services, and basic local exchange services."

The requirement under Michigan state law that prices set by the MPSC reflect TSLRIC costs (MSA 22.1469(352)) has been replaced with a requirement that such prices need only be just and reasonable effective January 1, 1997.

> what pricing policies would be pursued by each of the individual states, frustrating the potential entrants' ability to raise capital. <u>In sum, we believe that the pricing of interconnection, unbundled elements, resale, and transport and termination of telecommunications is important to ensure that opportunities to compete are available to new entrants</u>." (Emphasis supplied.)

Ameritech recognized the force of this argument by opposing the Eighth Circuit's issuance of a stay in Docket No. 96-3321 (<u>see</u> Ameritech's September 24, 1996, Opposition to Stay at 2): "A stay, and the resulting absence of effective interconnection rules, might encourage the Commission to deny Ameritech and other incumbent local telephone companies the opportunity to enter the market for long distance service within their local service areas." While Ameritech contended any such action would be unwarranted, its opposition to the stay effectively acknowledges that its reliance on rates that are not clearly governed by the Commission's costing rules is a fatal flaw to its Section 271 application.

II. AMERITECH'S APPLICATION FAILS THE TRACK A TEST BECAUSE THERE CURRENTLY IS NO "PREDOMINANTLY" FACILITIES-BASED NEW ENTRANT <u>SERVING BOTH BUSINESS AND RESIDENTIAL CUSTOMERS IN MICHIGAN</u>.

Ameritech claims it has complied with Track A (Section 271(c)(1)(A)) by:

> "entering into interconnection agreements with MFS, TCG and Brooks Fiber, all of which have been approved by the MPSC under Section 252(e) of the Act. These agreements satisfy the requirements of Section 271(c)(1)(A) that they be with competing providers of telephone exchange service, offered exclusively or predominantly over their own facilities, to residential and business customers. Brooks Fiber serves both residential and business customers. MFS and TCG are

> certified by the MPSC to serve both residential and business customers." (Brief at 7.)

Ameritech's claim that mere certification is adequate to meet the Track A requirements was recently refuted by the Department of Justice in its evaluation of SBC's Oklahoma application. The Department acknowledged that "Brooks has a tariff on file in Oklahoma" (Evaluation at 20), but concluded "it is not presently a 'competing provider of telephone exchange services ... to residential ... subscribers'" because of the "absence of any effort on Brooks' part to provide service on a commercial basis" (id. at 20-21). Accordingly, MFS and TCG currently do not meet the Track A test.

Concerning Brooks Fiber, Ameritech takes the position that the unbundled loops it provides to Brooks should be treated as Brooks' own facilities because: "facilities-based service necessarily encompasses all service other than resold service" (Brief at 12).

Ameritech argues that unbundled network elements constitute part of a competitor's "own" facilities (Brief at 12). According to Ameritech, Congress's use of the phrase "their own" (rather than "owned by") in Track A indicates an expansive definition that is not fixed by simple property definitions. In addition, Ameritech argues the phrase "predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier" suggests that only "resold" facilities are excluded from the definition of facilities-based, and that any other facilities acquired from an incumbent, such as unbundled network elements, should qualify as the competitor's "own" facilities (id.).

Ameritech's claims make no sense viewed in the light of general rules of statutory construction and the legislative history. Congress in this language was attempting to distinguish between the additional facilities created by a competitive provider, and the bottleneck facilities of the RBOC (absent effective facilities-based entry). Ameritech's argument would render the distinction intended by Congress almost meaningless, and would produce the absurd result that a carrier could be "facilities-based" even if it had never bought or owned any telecommunications facilities so long as it were content to provide its service via unbundled elements.

ALTS agrees that mere legal title need not be determinative. A CLEC that chooses to place competitive facilities in the ground using non-capitalized leases would still be a facilities-based carrier despite its lack of legal title because these facilities would be in addition to the bottleneck facilities originating with the RBOC. The most reasonable interpretation of the statute is that the facilities in question must be other than those emanating from the RBOC. In common usage, a carrier would not speak in terms of facilities that come from the ILEC as being its "own facilities," nor would one speak of facilities over which it does not have final control for purposes of maintenance and repair as one's "own" facilities.

The claim that unbundled network elements are somehow the competing carrier's "own" facilities ignores the fact that their ultimate control over facilities available by "resale" is indistinguishable from their control over unbundled network facilities.[15]

This interpretation is underscored by Section 271(c)(1)(A), which requires an RBOC to provide access and interconnection to "its network facilities for the network facilities of [an] unaffiliated competing provider." This language supports the conclusion that Congress intended to draw a line between facilities owned and operated by the RBOC, and the physically separate and distinct facilities owned, installed, operated, or ultimately controlled by the competitive provider.

Concerning the proper determination of whether a new entrant

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[15] Ameritech tries to save its attempted distinction between resold facilities and those provided through unbundled network elements by contending that the latter facilities enable new entrants to: "create and offer new and different services or service packages, and thereby create competitive advantage" (Brief at 13).

Even if Ameritech were correct, such a difference has no relevance here. In Track A Congress was concerned with precluding the inherent potential for abuse that exists when new entrants are unduly dependent on bottleneck facilities -- and not with insuring new entrants of flexible product creation. Compare In the Matter of Federal-State Joint Board of Universal Service, CC Docket No. 96-45 (released May 8, 1997) at ¶ 160, where the product differentiation potential of unbundled network elements was pertinent to the policies being considered by the Commission.

is actually facilities-based, ALTS proposes a rebuttable presumption that a CLEC qualifies as "predominantly facilities-based" if the number of access lines served exclusively over the CLEC's own facilities (i.e., those facilities which are 100% "RBOC-free") exceeds the number of access lines which use all or a portion of any ILEC's facilities. Such a test would be simple and easy, and would be applied independently to business and residence lines. Ameritech offers no such calculation in the present proceeding.

Ameritech's reading of the statute would also make the phrase "competing providers" in Section 271(c)(1)(A) meaningless. An entity like Brooks that is providing service to relatively few consumers in a small portion of a state is not "competing" with Ameritech in Michigan. A "competing" carrier is one providing sustainable competition, and "sustainability" is not measured by a single factor, but rather a wide range of indicia that each relate to competitive vigor:

- Is the growth in the number of customers served by new entrants less than the total customer growth in the market?
- Is the rate of competitive penetration accelerating, or is it slowing down, thereby suggesting a market ultimately controlled by a "dominant" incumbent?
- Are new entrants capable of achieving economies of scale and scope comparable to the incumbent?
- Are new entrants capable of raising capital and purchasing facilities on economic terms analogous to the incumbent?
- Are customers actually shifting between incumbent and new entrants in a fashion analogous to other competitive

industries (i.e., wireless and long distance)?

- Are there identifiable patterns of competitive entry and subsequent migration to adjacent markets, or are some markets resistant to competition?

These indicia are analogous to the considerations DOJ stated it would consider in judging Ameritech's "Customers First" plan for a long distance "experiment" under the MFJ. They also need to be applied here by the Commission in evaluating the meaning of "competing providers" to insure that sustainable competition actually exists before permitting Ameritech to enter long distance in Michigan.

III. <u>AMERITECH IS PRECLUDED FROM PROCEEDING UNDER TRACK B</u>.

Ameritech claims its application also can be considered under an alternative path known as "Track B".[16] This permits an RBOC to file a "statement of generally available terms" (an "SGAT") complying with the competitive checklist if, ten months after the date of enactment of the 1996 Act, no competitive provider "has requested the access and interconnection described in [Track A] before the date which is 3 months before the date the company makes its application." (§ 271(c)(1)(B)). As the MPSC recently determined in rejecting Ameritech's proposed SGAT, because interconnection requests have been filed in Michigan, Ameritech is prohibited by the clear language of the statute from

[16] "Ameritech has fully implemented the competitive checklist of Section 271(c)(2)(B) by providing each of the fourteen checklist items to its Section 271(c)(1)(A) competitors at rates and on terms and conditions that comply with the 1996 Act and the Commission's regulations" (Brief at i).

proceeding under Track B. In the Matter, on the Commission's Own Motion, to Consider Ameritech Michigan's Compliance with the Competitive Checklist in Section 271 of the Telecommunications Act of 1996, Case No. U-11104, released June 5, 1997, at 4.

Several portions of the statute confirm this prohibition. Track B identifies two situations in which an RBOC "shall be considered not to have received any request for access and interconnection:" (1) when a state commission certifies that a new entrant has not bargained in good faith; and (2) when a state commission determines a new entrant has violated the implementation schedule for an agreement (see the last sentence of Section 271(c)(1)(B)). These two exceptions demonstrate Congress was alert to the possibility the Track B option might be unfairly denied to a RBOC, and addressed the problem directly. In particular, the second caveat created by Congress -- unreasonable violation of an implementation schedule by a new entrant -- plainly demonstrates that an interconnection request moving ahead on its predetermined implementation schedules precludes any Track B option, since otherwise the caveat would make no sense.[17]

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[17] The possibility no new entrants may meet all the Track A criteria even after their interconnection requests have been fully implemented in no way alters this analysis. First, as noted above, Congress has already addressed any "unfairness" resulting from the disabling of Track B during the pendency of facilities-based interconnection requests by creating two express limitations on that disabling effect. These carefully tailored statutory solutions plainly preclude the creation of additional "equitable" limitations concerning the disabling effect of
(continued...)

Even if the statute were less clear concerning the disabling effect of interconnection requests on Track B, there are also legislative history and compelling policy reasons why the Commission should not allow any Track B application to proceed during the period before interconnection requests have been fully implemented. The legislative history of the 1996 Act clearly shows that Track A is Congress' preferred mechanism for in-region RBOC entry, a preference grounded on Congress' well-founded belief that it provides a better test of whether local barriers have been removed than does Track B. Accordingly, the Commission needs to prevent RBOCs from substituting Track B for Track A compliance.

The House of Representatives created the statutory provision which ultimately became Track A. The approach adopted by the House -- operational implementation of interconnection agreements -- was very different from the mere statements of "openness and availability" that would function as the basic interconnection requirement under other portions of the House

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[17](...continued) interconnection requests on the Track B option.

Second, even if the Commission had the power to revive the Track B option if it became clear that interconnection requests in a particular state could not result in qualifying Track A new entrants -- a power which ALTS respectfully insists does not exist -- such a power could only be exercised at a time and upon a record clearly showing that implementation of pending interconnection requests will not result in qualified Track A new entrants.

bill.[18] According to the House Commerce Committee Report, it decided to take this stricter approach because the "openness and accessibility" requirements of the House bill, which the ILECs would have discharged through statements resembling tariffs, "are truly validated only when an entity offers a competitive local service in reliance on those requirements" (H.R. Rep. No. 104-204 at 76-77):

> " ... the Commission must determine that there is a facilities-based competitor that is providing service to residential and business subscribers. <u>This is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the 'openness and accessibility' requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements</u>." (Emphasis supplied.)

The Conference Committee expressly adopted the House's approach to RBOC in-region long distance entry in current Section 271 (<u>see</u> H.R. Conf. Rep. No. 104-458, at 147: "This test that the conference agreement adopts comes virtually verbatim from the House amendment").

Congress' preference for Track A compliance reflects the obvious and palpable difference between a mere statement by an RBOC that it is willing to remove entry barriers, and a

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[18] The Conference Committee subsequently decided to impose interconnection obligations on the ILECs via agreements instead of statements, but this change does not alter the legal significance of the House's original decision to craft an entirely new and significantly more demanding approach for RBOC in-region long distance entry -- Track A.

competitor's provisioning of services based on actual removal. The first is only an ill-defined promise that could be easily dodged by an RBOC once it had received its Section 271 authority. The second is a real event which: (1) provides a more robust comparison to the statutory standard than a speculative paper promise; (2) is much more resistant to post-approval sabotage than simple promises, which are readily susceptible to gaming via "technical disputes" and "implementation difficulties; and (3) is consistent with the Department's conclusion in its "Oklahoma" evaluation that (Evaluation at 41): " ... a BOC must establish that the local markets in the relevant state are fully and irreversibly open to the various types of competition contemplated by the 1996 Act ...." Because of these important distinctions, Congress made operational implementation of competitive local services the <u>preferred</u> approach to RBOC long distance entry, and Track B -- the publication of an SGAT -- the <u>exception</u>.

The recent decision of the MPSC confirms this analysis. According to the MPSC (<u>In the Matter, on the Commission's Own Motion, to Consider Ameritech Michigan's Compliance with the Competitive Checklist in Section 271 of the Telecommunications Act of 1996</u>, Case No. U-11104, released June 5 1997, at 3):

> " ... this section of the federal Act provides two alternative methods for a Bell operating company to demonstrate compliance with the first statutory requirement for providing certain interLATA services. First, it may demonstrate that it has entered into approved, binding agreements for interconnection. Second, if no competitive provider has requested access and interconnection to provide

local exchange service within the statutory time period, the company may seek Commission approval of a statement of generally available terms and conditions for interconnection pursuant to Section 252(f). The Commission concludes that <u>if competitive providers have requested interconnection with the Bell operating company in a timely manner, the second option is not available</u>.*

*This interpretation has been adopted by, inter alia, the United States Department of Justice." (Emphasis supplied.)

Based upon the statutory language of Section 271(c)(1)(B), the clear policy preferences of Congress, and the decision of the MPSC, Ameritech should not be allowed to pursue a Track B application for Michigan.

IV. AMERITECH'S SECTION 271 APPLICATION <u>FAILS THE "PUBLIC INTEREST" STANDARD</u>.

In addition to the requirements of Section 271(c)(1)(A) ("Track A") and Section 271(c)(2)(B)(the "competitive checklist"), Section 271 applicants must also meet the public interest standard of Section 271(d)(3)(C). While Ameritech and the CLECs continue to debate the ultimate reach of the public interest standard, there is no question the Commission needs to examine carefully any anomalies in the emergence of new entrants, such as the absence of residential competition in Michigan's largest city, or an RBOC's repeated unwillingness to comply with the law. In these respects, Ameritech's application is seriously flawed for the reasons shown below.

A. The Lack of Local Competition in Detroit <u>Has Not Been Explained by Ameritech</u>.

Track A requires that competitors serve residential customers as well as business customers, but residential customers currently have competitive choices only in a few Michigan communities in and around Grand Rapids. None of the 10 million people living in metropolitan Detroit -- the largest city in Michigan and the fifth largest city in America -- are currently able to order competitive residential service. DOJ affiant Schwartz explained the significance of actual competition in DOJ Oklahoma evaluation (Schwartz at ¶ 20-21):

> "By far the best test of whether the local market has been opened to competition is whether meaningful local competition emerges .... If sufficiently diverse competition fails to develop, it is important to understand why. As implied earlier, one possibility is simply lack of interest by entrants in pursuing certain entry modes in certain regions. . ." But before reaching such a conclusion, it is important to ascertain that competition is not being stifled by artificial barriers." (Emphasis supplied.)

The absence of residential competitive alternatives either through resale or unbundled elements in the nation's fifth largest metropolitan area calls into question whether Ameritech has actually taken the steps necessary to open its markets to competition. DOJ stated in its Oklahoma evaluation that (at 55): "The places most likely to attract facilities based entry in Oklahoma are the state's two metropolitan areas, Tulsa and Oklahoma City ...." Similarly, the fundamental assumption underlying the various cost models being considered by the Commission in its Universal Service docket is that provisioning to customers in dense wire centers is less costly, and hence more attractive to new entrants, than in less dense areas.[19]

It may be the case, for example, that Ameritech has failed to deaverage unbundled loop prices to properly reflect economies of loop densities.[20] Whatever the reason, it should be Ameritech's obligation to explain how it has complied with its Section 271 obligations without any emergence of competitive residential offerings in what should be one of Michigan's most attractive competitive markets for residence service.

B. Ameritech May Be Illegally Reselling InterLATA Service Within Michigan.

MCI filed a complaint with the Commission on April 10, 1997, alleging that Ameritech resells in-region long distance service within Michigan as well as in the other Ameritech states. According to the complaint, Ameritech calling card operators complete in-region calls using the resold services of a single long distance provider. Customers are not permitted to choose an alternative carrier, nor are they informed the service is not provided by Ameritech itself.

If the allegations of the Complaint are true, Ameritech is clearly guilty of reselling long distance service without Section

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[19] See, e.g., Recommended Decision in CC Docket 96-45 at Appendix F, p. F-2: "... many rural areas are extremely high cost regions ...."

[20] See, e.g., 47 C.F.R. §51.507(f): "State commissions shall establish different rates for elements in at least three defined geographic areas with the state to reflect geographic cost differences."

271 authority or Section 272 compliance. The MFJ court long ago placed strict bounds on RBOC resale of long distance service, bounds that remain in effect to this day (United States v. Western Electric, 673 F.Supp. 525, 520 n. 69 (D.D.C. 198): "Interexchange services include both facilities-based services and the resale of the services of others").[21] These restrictions were fully retained in the 1996 Act (Section 252(g)), and not altered by the "incidental interLATA services" exception of Section 271(g).

Ameritech's willingness to defy its current MFJ obligations is plainly relevant to its willingness to comply with Section 272, as well as its factual credibility in general. Ameritech's 271 authority should not be granted until and unless Ameritech can show that these allegations are unfounded.

C. Ameritech Has Failed to Provide IntraLATA Dialing Parity as Required by the Michigan Public Service Commission.

A glaring defect in Ameritech's application is its repeated disregard for outstanding orders of the MPSC that require it to implement IntraLATA dialing parity in Michigan.[22] In order to

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[21] The MFJ court carefully parsed the RBOCs' responsibilities concerning calling cards in United States v. Western Electric, 698 F.Supp. 348, 350-53 (D.D.C. 1988), and concluded they cannot provide long distance services via calling cards with making those services available to all IXCs.

[22] See DOJ Schwartz Affidavit in CC Docket No. 97-121, filed May 16, 1997, at ¶ 141: "Dialing parity -- the ability to reach a carrier other than the LEC without dialing additional digits -- is very important to subscribers who must dial (continued...)

fully appreciate Ameritech's efforts to preserve its approximately $50 million a month IntraLATA toll market in Michigan, it is necessary to set out the chronology of this dispute:

02-02-1994	**MPSC orders IntraLATA dialing parity**
08-17-1994	**Ameritech appeals MPSC order**
01-20-1995	**MPSC orders implementation**
04-07-1995	**Ameritech appeals implementation order**
09-09-1995	**Ameritech-sponsored legislation is introduced to eliminate dialing parity obligations prior to receipt of interLATA authority**
11-30-1995	**Legislation modified to delay dialing parity obligation by four months**
01-01-1996	**Ameritech converts 10% of switches**
01-02-1996	**Michigan court denies first Ameritech appeal**
05-02-1996	**IXCs move to compel dialing parity**
06-26-1996	**MPSC grants IXC motion, Ameritech ordered to provide full dialing parity**
07-09-1996	**Ameritech petitions for reconsideration**
10-07-1996	**MPSC denies Ameritech's petition for reconsideration**
10-18-1996	**Federal District Court declines to stay MPSC order**
11-20-1996	**Michigan court orders Ameritech to comply**
11-22-1996	**Ameritech appeals to Michigan appellate court**
12-04-1996	**Michigan appellate court grants stay pending**

[22] (...continued) manually, such as most residential subscribers and small businesses lacking a PBX."

consideration of Ameritech's appeal

Other events underscore this sad history of anticompetitive behavior. In December of 1995, just before the opening of intraLATA competition -- as least, just before the MPSC thought it would be opened -- Ameritech unveiled a new service offering to its millions of Michigan customers. Under the guise of "helping" customers avoid unauthorized changes in long distance carriers (known as "slamming in the long distance industry), Ameritech offered to "freeze" current long distance carriers for its customers. This mechanism would have the effect of preventing any changes in IntraLATA carriers as well, <u>even though slamming was not even possible for IntraLATA services when the insert describing this service went out</u>.

The MPSC found conclusive evidence that the insert was "deceptive and misleading" (<u>In the Matter of the Complaint of Sprint Communications Company, L.P. against Ameritech Michigan</u>, Case No. U-11038, decided August 1, 1996, at 6-7):

> 'The Commission finds the bill insert to be deceptive and misleading. Just a few months before sending the bill insert, Ameritech Michigan had provided notice of the impending implementation of IntraLATA dialing parity and used the terminology 'IntraLATA toll calling.' Exhibit I-24, p.2. Ameritech conducted a media campaign a few weeks after mailing the bill insert to encourage those who had not done so already to request PIC protection. It did not use the phrase 'long-distance' service as the bill insert had used that phrase. It referred to 'long-distance and/or local-toll service.' Exhibit I-43, pp. 4-7. Yet, in the bill insert, Ameritech Michigan used the term 'long-distance' to mean inter- and intraLATA services.
>
> "In addition, the bill insert is misleading because it states that 'Ameritech can do nothing to resolve the problem

> after your long distance service has been slammed.' As Ameritech Michigan admits in its brief, '[t]he only remedy that can be provided by Ameritech once a customer has been slammed is to switch the customer back to his or her chosen carrier.' To a customer who has been slammed, being switched back to his or her chosen carrier is hardly 'nothing ... [B]y falsely implying that the customer would be stuck with the carrier that slammed his or her account, Ameritech Michigan sought to create a sense of urgency to enroll in PIC protection just as IntraLATA dialing parity was about to be offered to some customers.'"

The plan to send the bill insert to 12 million Ameritech customers was developed by Ameritech's Product Manager, IntraLATA Toll, whose responsibilities include retaining Ameritech's IntraLATA market share (id. at 9).

Nor has Ameritech been content with just fighting orders to implement dialing parity and "freezing" IntraLATA carrier selections. On October 30, 1996, AT&T filed a complaint with the MPSC claiming that the quality of Ameritech's access service has deteriorated over the last two years. According to AT&T and MCI, long distance carriers suffer lengthy delays in provisioning new services, and incur unreasonable service outages (Case No. U-11240).

This barrage of anti-competitive behavior was breezily dismissed in a document Ameritech filed with the MPSC, its "Compliance Filing and Request for Approval of Plan on IntraLATA Toll Dialing Parity" dated November 26, 1996 (a time when Ameritech was in defiance of MPSC and state court orders). Keeping its eye firmly on its current $50 million per month of IntraLATA toll revenues while still hoping to justify entry into the interLATA business in Michigan, Ameritech brazenly attempted to "plea bargain" away its non-compliance by offering to implement 70% of dialing parity by the time it filed a Section 271 application, and the remaining 30% within 10 days of receipt of its Section 271 permission.

This history receives barely a mention in any of Ameritech's three Section 271 applications for Michigan. Buried in footnote 27 to its first brief was the statement that:

> "Although IntraLATA toll dialing parity is not a checklist item, as of the date of this filing Ameritech Michigan has implemented IntraLATA toll dialing parity in exchanges representing 70 percent of its access lines. The remaining exchanges and access lines will be activated at least 10 days prior to the provision of in-region interLATA service in Michigan by Ameritech. Mayer Aff., ¶¶ 270-277."

Ameritech's current Brief contains the identical statement (at 53, n. 68).

Ameritech's message could not be more blunt -- give us our Section 271 authority first, and only then we will comply with the MPSC's order by completing IntraLATA dialing parity.

The issue here, of course, is not whether any part of Section 271 specifically requires an RBOC to implement IntraLATA dialing parity in the absence of any state requirement (a matter on which ALTS takes no position). Rather, the question is whether an RBOC's Section 271 application could possibly meet the public interest test of Section 271(d)(3)(C) when the RBOC admits it is still disregarding state agency orders deemed critical to successful local competition. The answer should be no.

D. Ameritech Should Be Ordered to Include Local Calls <u>to ISPs Within Transport and Termination Agreements</u>.

The Commission has long held that local calls to ISPs must be treated as local calls by LECs regardless of whether the ISP reformats and/or retransmits information received over such calls to/or from further interstate destinations.[23] Unfortunately, some ILECs, such as NYNEX and Bell Atlantic, contend that this clear rule does not apply to those local calls to an ISP where the call is exchanged between an ILEC and a CLEC. Because Ameritech has not responded authoritatively to ALTS's request that it clarify its position on this important issue (<u>see</u> Attachment B: correspondence between R. Metzger and J. Lenahan), ALTS requests that the Commission clarify this matter before it reaches the merits of Ameritech's application.[24]

The underlying issue is simple. Picture a local calling area, with a call going between an end user and an ISP within that area under three different scenarios: first, where a single

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[23] <u>See</u>, <u>e.g.</u>, <u>Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers</u>, 3 FCC Rcd 2631, 2633 (1988).

[24] Ameritech's Tim Whiting did recently testify that (<u>Petition by Intermedia Communications, Inc. For Arbitration with Ameritech Illinois Pursuant to the Telecommunications Act of 1996</u>, ICC Docket No. 97 AB-002, submitted May 27, 1997, at p. 6): "I am informed by the Ameritech attorneys who are responsible for Ameritech's agreements with requesting telecommunications carriers under the Act that Ameritech in fact does <u>not</u> provide interconnection for Internet traffic under section 251(c)(2)." (Emphasis in original.)

LEC handles both ends of the call; second, where a CLEC handles one end and an ILEC the other; and third, where an ILEC handles one end and an adjacent ILEC handles the other. BA and NYNEX acknowledge the first call must be handled as a local call under the Commission's rules, and be treated as a local call for separations and tariff purposes,[25] but they now contend that the identical call under the second scenario cannot be treated as "local" for the purpose of being included in Transport and Termination agreements between ILECs and CLECs.[26]

Concerning the third scenario, all the RBOCs are utterly silent. This silence conceals the discriminatory application of their new theory, because, to the best of ALTS's knowledge, they continue to treat local calls to ISPs that they exchange with adjacent LECs as "local" within their interconnection agreements with those companies (as well as for separations and tariff purposes) even though those calls present precisely the circumstances, legally and economically, as the second

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[25] Bell Atlantic's analysis of local calls to ISPs which its handles by itself apparently also applies to any associated vendors it happens to choose -- but not to CLECs. See, e.g., BA's amendment to its CEI plan to expand its Internet Access Service dated May 5, 1997, CCB Pol. 96-09, at 3: "Bell Atlantic's vendor will subscribe to local telephone services -- either standard business lines or ISDN -- to receive the call."

[26] Currently all LECs (including BA and NYNEX, to the best of ALTS's knowledge) treat calls within a local calling area to an ISP as local calls for the purposes of separations and tariffs -- without any distinction as to local call to ISPs that involve a LEC-to-LEC handoff.

scenario.[27]

Nothing in the 1996 Act or the Commission's implementing rules altered any aspect of the rule that calls to ISPs from within local calling areas be treated as local. The Commission in its Local Competition Order (CC Docket No. 96-98, decided August 8, 1996) discussed at length the scope of the interconnection obligations contained in Sections 251 and 252 as they relate to local and interexchange traffic at three different parts of its decision (¶¶ 356-365; 716-732; 1033-1038). This discussion carefully explains what kinds of traffic can be handled through Transport and Termination agreements. Nowhere in this extensive discussion did the Commission announce any change in its longstanding rule that calls to ISPs from within a local calling area must be treated as local calls by LECs.

Furthermore, the Commission in its Usage of the Public Switched Network by Information Service and Internet Access Providers NOI (CC Docket No. 96-263, released December 24, 1996, "Internet NOI"), recounted the long history of its requirement that calls to ISPs from within local calling areas be treated as local calls regardless of the ISP's subsequent handling of the call, and requested comments on whether this policy should be

[27] None of the interconnection agreements between adjacent LECs of which ALTS is aware (all of which are to be filed with state agencies no later than June 30, 1997) distinguish between calls to an ISP within a local calling area that are exchanged between LECs, and any other kind of local traffic exchanged between the LECs.